honest and capable. Here was the secret of the whole matter. The fortune of $40,000,000 disclosed by his death is a testimony to both the honesty and the ability with which he made use of circumstances, and at the same time rendered a great service to the community at large. The essential means by which he was able to create this immense fortune was mainly the faith of the public in his honesty and ability.

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TWO DECISIONS RELATING TO ORGANIZED LABOR

Since the publication in the March number of the *Journal* of Mr. Clark's article on the "Legal Status of Organized Labor," the decisions in two cases of interest to labor combinations have been handed down by courts of last resort — the case of Berry *vs.* Donovan[1] by the Massachusetts Supreme Court, and that of the South Wales Miners' Federation *vs.* the Glamorgan Coal Company,[2] by the British House of Lords. Both cases involve questions of privilege, or of justification for acts *prima facie* unlawful.

Berry *vs.* Donovan is a case involving the so-called "closed-shop" contracts, and, in the opinion handed down, the Massachusetts court passes upon the question whether or not such a contract, voluntarily entered into by the employer with the union, will justify the union in procuring the discharge of an employee who has refused and continues to refuse to become a member of the union. The *prima facie* wrong committed here is the intentional interference by the union with the rights of an individual "to dispose of one's labor as he will and to have the benefit of his lawful contracts." The facts of the case are as follows: Berry was a shoemaker who had been for four years in the employ of a Haverhill firm, under a contract terminable at will. Donovan was a member, and the representative at Haverhill, of a national organization of shoe-workers — the Boot and Shoe Workers' Union. A contract was entered into by the union and the employing firm, in which the employers agreed to employ as shoe-workers only members in good standing, and not to retain any shoe-worker after receiving notice from the union that such shoe-worker was "objectionable to the union, either on account of being in arrears for dues, or disobedience of the union rules or

[1] 74 Northeastern Reporter, 603.

[2] L. R. 1905, Appeal Cases, 239.

laws, or for any other cause." There were also provisions referring to the mutual rights of the employers and the union in other matters, such as the use of the union label on the firm's goods, etc. Four days after the execution of the contract Donovan demanded and secured the discharge of Berry on the sole grounds of his continued non-membership in the union.

Assuming, as the court does, that "the intentional interference with the right to dispose of one's labor as he will . . . . without lawful justification" is a legal wrong, the question is raised, whether the existence of such a contract constitutes a lawful justification. The court holds that it does not, that so far as the contract affects the hiring of employes, it has nothing to do with plaintiff's right to continued employment, since he had been previously hired. If the contract was to apply at all, it was on the ground that plaintiff was "objectionable to the union;" and the exercise by the union of this right to dictate though given by the contract is not thereby justified and so legalized.

This case recalls that of Christensen *vs.* the People,[3] and Jacobs *vs.* Cohen,[4] in which the closed-shop contract has been passed upon by the intermediate courts in Illinois and New York. In the Illinois case, such a contract is alleged to be illegal as tending to create a monopoly, and an agreement to strike, in order to force the adoption of such a contract, becomes an unlawful agreeemnt. In Jacobs *vs.* Cohen, an employer, who had become a party to a closed-shop agreement and given a note to secure its performance, was sued for the violation of the contract on the note, and it was held that the contract, being against public policy, would not be enforced, and the note could therefore not be collected.[5]

In Berry *vs.* Donovan, it was likewise argued, that, even if the existence of the contract did not justify the damage wrought, it was justified by the fact that it was procured in the furtherance of a kind of competition between the union and non-union factions in the working class, a competition which tends to the uplifting of the working class, is necessary to the success of the employed in

[3] 114 Ill. App. 41.; Ante, p. 184.

[4] 90 N. Y. Supplement, 854.

[5] The employer may observe the terms of the contract, if he so desires, and give them as his reason for dismissing a non-union man without doing the dismissed man a legal wrong. Mills *vs.* Printing Company, 91 N. Y. Supp. 185.

their struggle with the employing class, results in a fairer distribution of the product of industry, and is of final benefit to society.[6]

Upon the subject of working-class competition, the Massachusetts court has had interesting things to say in earlier cases,[7] and in the opinion under discussion, the topic is further considered:

An interference by a combination of persons to obtain the discharge of a workman because he refuses to comply with their wishes for their advantages in some matter in which he has a right to act independently is not competition. Such action, taken by the combination, is not in the regular course of their business as employees, either in the service in which they are engaged or in an effort to obtain employment in other service. The result which they seek to obtain cannot come directly from anything that they may do, within the regular line of their business, as workers competing in the labor market. . . . . Indeed, the object of organizations of this kind is not to make competition of employees with one another more easy or successful. It is rather by association, to prevent such competition, to bring all to equality, and to make them act together in a common interest. . . . . or, if the attempted justification rests upon competition of another kind, namely, that between employers and employed, in the attempt of each class to obtain as large a share as possible of the revenue from their combined efforts in the industrial field. In a strict sense, this is hardly competition. . . . . In a broad sense, perhaps, the contending forces may be called competitors. . . . . It is no legal objection to action whose direct effect is helpful to one of the parties in the struggle, that it is also directly detrimental to the other. But, when action is directed against the other, primarily for the purpose of doing him harm and thus compelling him to yield to the demands of the actor, and this action does not directly affect the prosperity of business or status of the actor, the case is different, even if the actor expects to derive a remote or indirect benefit from the acts. The gain which a labor union may expect to derive from inducing others to join is not an improvement to be obtained directly in the conditions under which the men are working, but only added strength for such contests with employers as may arise in the future. An object of this kind is too remote.[8]

In the South Wales Miners' Federation *vs.* the Glamorgan Coal Company we have the decision of the lower court in the famous Stop-

[6] Under the doctrine of the Mogul Steamship Company *vs.* Macgregor *et al.*, L. R. 1892 App. Case 25, which holds that, because of the final value to society of the effects of competition in business, acts done in course of business, resulting in damage to an individual, do not give rise to legal liability, when the purpose of the hurtful act is the actors' gain and not the resulting harm.

[7] Vegelahn *vs.* Guntner, 167 Mass. 92; Plant *vs.* Woods, 176 Mass. 492.

[8] The competition which was expressly admitted in the Mogul S. S. case was described as "competition in the near future to prevent competition in the remoter future."

Day case affirmed by the House of Lords. The facts here were as follows: The federation, a registered trade union, was formed, among other purposes, in order to consider trade and wages, to protect the workmen and regulate the relation between them and employers, and to call conferences. The wages were paid upon a sliding-scale arrangement, rising and falling with the price of coal. In November, 1900, the council of the federation, fearing that the action of merchants would reduce the price of coal and consequently the rate of wages, ordered a stop-day, on which over 100,000 men took holiday, in breach of their contract of service. The difficulty growing out of the action was adjusted, and later, at a conference between the men and the federation council, the latter was authorized to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally, and this authority was exercised on four days during the year 1901.

For procuring, on the part of the workmen, these breaches of their contracts of service, the company sued the federation. It was found that the federation was influenced by an "honest desire to forward the interest of the workingmen, and not at all by any purpose to injure the company, and it was therefore argued that the federation had lawful justification for what it did. And this view of the case was that taken by the judge before whom it was first tried.[9]

"Then do the facts of the present case constitute a justification or excuse? I think they do. I have found that there was no malice, no desire to injure, ... the order was issued because the men had asked the council of the federation to advise them from time to time as to when they should stop. Stopping no doubt involved a breach of the men's contract with their masters. But if a man asks another for advice as to whether or not it is wise to break a contract, is not the person asked, entitled so long as he acts honestly, to give the advice, and if the advice is followed, do not the circumstances afford the man who gave it sufficient excuse? . . . . In the present case I find that the federation acted honestly, and without any malice, and in ordering the stop-days did no more than that which they conceived to be in the best interests of the men, whom they represented, and for whom they were acting. . . . . having been solicited by the men to advise and guide them in the question of stop-days, it was their duty and their right to give the advice and to do what might be necessary to secure that the advice should be followed."

That decision was, however, overruled by the Court of Appeal,[10] and in the decision of the House of Lords we have the judgment of the Court of Appeal affirmed as against that of the lower court.

[9] L. R. [1903] 1 K. B. 118 at 135.

[10] [1905] 2 K. B. 545.

These cases are both interesting from several points of view, but especially because they illustrate two important limitations placed by the law upon the activity of trades unions.

In the Massachusetts cases, Donovan acted as the agent of the union under the authority given by the contract, and the conduct of Donovan is treated as the conduct of the union.[11] And while the court expressly distinguishes this from the case of one who seeks employment and is prevented from getting it by union activity, it seems probable that in that case, too, the right of the individual "to dispose of his labor as he will," and the narrow range within which the court admits this struggle for a share in the product of industry, on the part of the trade-union portion of the working class, to come within the category of a kind of competition advantageous to society, would prevent the union from availing itself in effectual ways of the closed-shop contract, for the purpose of extending its membership.

From the "Stop-Day" case, it is clear that, where its authority prevails, the relation of the union to its members is not such as to justify it in advising them as a matter of trade policy to do anything which constitutes the breach of a legal right, although it may well be argued that where such combinations are held to be lawful, the chief functions for which they are organized, namely, the advice and direction of the members in relation to trade controversies should be held likewise lawful.[12]

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LIMITATION OF HOURS OF LABOR AND THE SUPREME COURT

The decision of the U. S. Supreme Court in the case of Lochner *vs.* New York, declaring unconstitutional a ten-hour law for bakeries, has been the subject of much comment, both favorable and adverse, not only in this country, but in Europe as well. While the main interest in it has been social and economic, it is upon legal grounds that it requires and is entitled to be judged.

In the development of constitutional doctrine, the decision will be

[11] The act is referred to as a "boycott," p. 607.

[12] W. H. Beveridge, "The Reform of Trade Union Law," *Economic Review*, XV, 137.